



Legislative Bulletin.....August 4, 2007

Contents:

S. 1927 — Protect America Act of 2007

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: \$0

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 0

Number of Bills Without Committee Reports: 1

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

S. 1927 — Protect America Act of 2007 (Sen. McConnell, R-KY)

Order of Business: The bill is scheduled for consideration on Saturday, August 4 2007, likely under a motion to suspend the rules and pass the bill.

Brief History: The Senate passed S. 1927 last night by a vote of 60-28. The House version of FISA reform, H.R. 3356, failed by a vote of [218-207](#) under suspension of the rules yesterday. [Click here](#) to view the RSC Legislative Bulletin on H.R. 3356.

Note: The Rules of the House only allow bills to be considered under suspension of the rules on Mondays, Tuesdays, and Wednesdays. For a bill to be considered under suspension of the rules during the remainder of the week, the Rules Committee must pass a rule (as they did earlier this week to consider H.R. 3356).

Summary: S. 1927 would amend the Foreign Intelligence Surveillance Act (FISA) of 1978 to amend procedures to request and initiate an electronic surveillance order. The major provisions of the bill are summarized below. Where applicable, differences with the H.R. 3356 (the bill considered by the House yesterday) have been noted.

Additional Procedures for Authorizing Certain Electronic Surveillance.

- States that nothing in the definition of electronic surveillance (section 101(f) of FISA) may be construed to encompass surveillance directed at a person reasonably believed to be outside the U.S. In other words, if the person under surveillance is outside the U.S., it does not qualify as “electronic surveillance” and therefore is not subject to the same restrictions, court orders, etc.

Note: This provision is broader than the provision contained in H.R. 3356, which simply stated that a court order is not required to conduct surveillance on persons outside the U.S. (but did not change the definition or explicitly provide the intelligence community surveillance authority on persons not in the U.S.).

- Authorizes Director of National Intelligence (DNI) and the Attorney General (AG) to authorize the acquisition of foreign intelligence information for up to one year on persons believed to be outside the U.S., if:
 - “reasonable procedures” are in place to determine that the information acquired concerns persons reasonably believed to be outside the U.S. (and such procedures are subject to court review);
 - the acquisition does not constitute electronic surveillance;
 - the acquisition involves obtaining the foreign intelligence information from or with the assistance of a communications service provider (or related person or agent) who has access to communications;
 - a significant purpose of the acquisition is to obtain foreign intelligence information; and
 - the minimization procedures to be used adhere to current law.

Note: Related provisions contained in H.R. 3356 required the AG to apply to a judge to obtain authority for up to one year to conduct foreign intelligence.

Foreign intelligence information is defined in U.S. Code to mean information necessary to protect the United States against actual or potential grave attack, sabotage, or international terrorism.

Electronic surveillance means the acquisition (using a surveillance device) of any wire, radio, or related electronic communication sent or received by a known U.S. person where the person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

Minimization procedures means specific procedures that must be adopted by the AG designed to minimize the acquisition and retention – and to prohibit the dissemination – of non-publicly available information concerning unconsenting U.S. persons.

Source: 50 U.S.C 1801(e).

- Requires the determination by the DNI or the AG of the above-noted provisions to be in the form of a written certification, under oath, supported as appropriate by affidavit of appropriate officials in senior positions in the national security field.

- States that the certification is not required to identify the specific facilities, places, premises, or property where the acquisition of foreign intelligence information is being directed. (A similar provision was included in H.R. 3356).
- Requires the AG to transmit “as soon as practicable” a copy of a certification (under seal) to the applicable court.
- Allows an acquisition to be conducted based on oral instructions by the AG or NDI if time does not permit the preparation of a certification, and requires the AG and NDI to ensure that minimization and other relevant procedures are adhered to.
- Authorizes the DNI or AG, regarding an authorized acquisition, to direct a person to:
 - immediately provide the government with all information and assistance necessary to accomplish the acquisition, and in a way that will protect the secrecy of the acquisition and produce minimum interference with any services the person may be providing;
 - maintain, under security procedures approved by the AG, any applicable records regarding the acquisition or aid furnished.

Note: A similar provision existed in H.R. 3356, but it applied to a judge’s order.
- Requires that the government compensate, at a prevailing rate, a person for providing information and assistance pursuant to the above provision.

Note: A similar provision existed in H.R. 3356, but it applied to a judge’s order.
- Authorizes the AG, in the case of a failure to comply with a directive to comply with an acquisition, to invoke the aid of the relevant court, and directs the court to issue an order requiring the person to comply (if the directive is found to comply with regulations). Failure to obey the court’s order may be punished by the court as contempt of court.
- Allows any person receiving a directive (regarding an acquisition) to challenge the legality of that directive by filing a petition under procedures set forth in current law (section 103(e)(1) of FISA), and requires the court to conduct an initial review within 48 hours, among other stipulations.
- Requires the AG, within 120 days of enactment, to submit to the applicable court the procedures by which the government determines that acquisitions (section 105b, regarding foreign intelligence) do not constitute electronic surveillance (i.e. – does not involve surveillance on U.S persons). These procedures must be updated and resubmitted to the court annually. Unless the court concludes that the determination used is “clearly erroneous,” it must enter an order approving the continued use of the procedures. If the court finds the determination to be clearly erroneous, the government must submit new procedures within 30 days.

Note: H.R. 3356 contained a similar provision.
- Requires the AG, on a semi-annual basis, to inform the relevant congressional committees concerning acquisitions during the previous 6-month period. The report must include incidents of non-compliance by the intelligence community of the established

guidelines, and the number of certifications and directives issued during the reporting period.

Note: H.R. 3356 contained a similar provision.

- **Sunset:** All of the above-mentioned provisions expire 180 days after enactment (though the bill allows certain existing directives to continue for up to one year).

Note: H.R. 3356 contained a similar section, sunseting all the provisions of the Act within 180 days.

Additional Background: FISA was created in 1978 to establish a process for obtaining a court order to conduct foreign intelligence surveillance within the United States. Due to dramatic changes in telecommunications technology since then, FISA now frequently requires government officials to obtain a court order to gather information on suspected terrorists and various other foreign intelligence targets located overseas. Federal law has not historically restricted law enforcement officials or intelligence agents from monitoring overseas communications, and this bill is intended to address these concerns.

Previous Conservative Concerns: Several of the major concerns that some conservatives had with H.R. 3356 have been rectified in S. 1927, including clarifying the definition of electronic surveillance to exclude persons outside the U.S., and allowing the Attorney General or the Director of National Intelligence to authorize foreign intelligence information gathering without a court order.

The provisions of the bill expire in 180 days (rather than after 120 days in H.R. 3356), so a permanent solution to these FISA issues will still be necessary.

The bill is supported by Intelligence Committee Affairs Ranking Member Pete Hoekstra and Judiciary Committee Ranking Member Lamar Smith. Director of National Intelligence McConnell strongly opposed H.R. 3356. While a statement from Director McConnell on the Senate-passed S. 1927 was not available, the bill does address several of the primary concerns noted in his letter dated August 2, 2007, which included the following statement:

First, the Intelligence Community should not be required to obtain court orders to effectively collect foreign intelligence from foreign targets located overseas. The bill must not require court approval before urgently needed intelligence collection can begin against a foreign target located overseas. The delays of a court process that requires judicial determinations in advance to gather vital intelligence from foreign targets overseas can in some cases prevent the rapid gathering of intelligence necessary to provide warning of threats to the country.

Committee Action: S. 1927 was passed by the Senate by a vote of 60-28 on Friday, August 3. H.R. 3356, the House FISA bill, was introduced and considered on Friday, August 3.

Administration Policy: An official Statement of Administration Policy is not available, but the President made the following statement this morning in support of S. 1927:

Last night, the United States Senate passed legislation to give our intelligence professionals the legal tools and authority they need to keep America safe. I appreciate the hard work they did to find

common ground to pass this critical bill. Today, the House of Representatives has an opportunity to consider that bill, pass it and send it to me for my signature. Protecting America is our most solemn obligation and I urge the House to pass this bill without delay.

Cost to Taxpayers: A CBO score of S. 1927 is unavailable, though the bill does not authorize any expenditures.

Does the Bill Expand the Size and Scope of the Federal Government?: The bill clarifies and alters current regulations and requirements regarding electronic surveillance and foreign intelligence information gathering.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: A committee report citing constitutional authority is unavailable. House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

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